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IN THE MATTER OF THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1970, CHAPTER 318, AS AMENDED,

AND IN THE MATTER OF the complaint of Mrs. Sylvia Fuller against Candur Plastics Limited

BOARD OF INQUIRY

Robert W. Kerr

Appearances:

Ms. Janet Minor) Ms. Leith Hunter)	Counsel for the Ontario Human Rights Commission and the Complainant, Mrs. Sylvia Fuller
Robert Falby) Allan Kling) (student-at-law)	Counsel for the Respondent, Candur Plastics Limited
Dates of Hearing)	April 28 and 29, 1981
Place of Hearing)	10 Wellesley Street East, Toronto, Ontario

DECISION

The complainant, Mrs. Sylvia Fuller, is a black person of Jamaican origin. She was employed by the respondent, Candur Plastics Limited, from August 14, 1978 to March 28, 1979. Following the end of her shift on the latter date, she was dismissed. The complaint alleges that this dismissal was because of the race, colour, nationality, ancestry and/or place of origin, of the complainant and therefore constitutes a violation of section 4 (1) (b), (c) and (g) of the Ontario Human Rights Code, R.S.O. 1970, c. 318, as amended.

The respondent manufactures a variety of molded plastic containers. Each type of container is mass-produced by an automated molding machine. The finished containers, however, are manually inspected and packed into boxes. The respondent operates three shifts a day, Monday to Friday. Each shift is under the supervision of a foreman. There is also a person known as a forelady on each shift who has certain supervisory responsibilities on the shop floor, although this position appears rather more that of a lead-hand, than that of a true member of management. In addition to the forelady, there are a variable number of employees (approximately 8 to 12) on the shop floor, each of whom is assigned on a rotation-basis by the forelady to inspect and pack the output of a molding machine.

The complainant was employed on the afternoon shift (4:00 p.m. to 12:00 midnight) to inspect and pack containers. The foreman on this shift was Egon Ledermann. On March 26, 1979, the position of forelady was assumed by Christine Thuilliard. Dulcie Atkins, another black person of Jamaican origin and a personal friend of the complainant, had expected to receive this promotion since she had seniority among the workers on the shift and was recommended by

the previous forelady. As a result, certain ill-feelings were generated. Although the exact course of events is in dispute, it does appear that sometime on March 27 and/or 28 one or more incidents of actual or threatened physical conflict occurred between the complainant and Mrs. Thuilliard as a by-product of this ill-will. Whatever such incidents may have involved, at about the mid-point of the shift on either March 27 or March 28, the complainant reported to Mr. Ledermann that Mrs. Thuilliard had slapped her on the face.

Because of the complainant's emotional state at the time and her rather strong Jamaican accent, she was unable to make Mr. Ledermann understand her grievance. In an effort, as she says, to demonstrate, the complainant slapped Mr. Ledermann on the face. Mr. Ledermann subsequently obtained clarification of the complainant's grievance through Mrs. Atkins. The complainant returned to work. At the end of her shift on March 28, Mr. Ledermann advised her that she was fired. She appears not to have been given reasons for her dismissal.

At the hearing the reason for dismissal offered by the respondent's witnesses was the fact that the complainant had slapped Mr. Ledermann, her supervisor. It was denied that her race, colour, nationality, ancestry, or place of origin had been a factor.

At the outset, it should be made clear that under section 4 of the Human Rights Code it is sufficient to constitute an offence if a prohibited factor is one of the grounds of the employer's decision. It is not even necessary that the prohibited factor be a major element in the decision, as long as it an operative element. I am buttressed in this conclusion by the decision in R. v. Bushnell Communications Ltd. (1973), 1 O.R.(2d) 442 (H.C.), affirmed (1974), 4 O.R. (2d) 288 (C.A.), dealing with comparable use of the words "because of" in the Canada Labour Code, R.S.C. 1970, c. L-1, s. 110 (3).

In determining the operative elements in a decision, the first step is to identify the decision-maker. In this case, it is clear that, although the owners of the respondent, Dieter Sander and Uwe Meyer, made hiring decisions at the time relevant to this case, all subsequent decisions on employment status, such as lay-off, recall and dismissal, were left in the hands of the foreman of the shift concerned. Thus, it is Mr. Ledermann's motivation that must be focused upon in this case.

Once the decision-maker is identified, a common problem in such cases is that the real reasons for the decision are known only to that person. As was stated in Kennedy v. Mohawk College (Ontario Board of Inquiry, Borins, 1973) at 4-5:

> Discrimination on the grounds of race or colour are frequently practised in a very subtle manner. Overt discrimination on these grounds is not present in every discriminatory situation or occurence. In a case where direct evidence of discrimination is absent, it becomes necessary for the Board to infer discrimination from the conduct of the individual or individuals whose conduct is in issue. This is not always an easy task to carry out. The conduct alleged to be discriminatory must be carefully analysed and scrutinized in the context of the situation in which it arises. In my view, such conduct to be found discriminatory must be consistent with the allegation of discrimination and inconsistent with any other rational explanation. This, of course, places an onus on the person or persons whose conduct is complained of as discriminatory to explain the nature and purpose of such conduct. It should also be added that the Board must view the conduct complained of in an objective manner and not from the subjective

> viewpoint of the person alleging discrimination whose interpretation of the impugned conduct may well be distorted because of innate personality characteristics, such as a high degree of sensitivity or defensiveness.

Some overt evidence of discrimination was tendered in this case in the complainant's testimony that Mrs. Thuilliard had called her a "monkey" with specific reference to the event of dismissal, and had acknowledged this to be a reference to the complainant's colour. Mrs. Thuilliard denied this, but if the complainant is believed the inference is possible that Mrs. Thuilliard influenced the decision to dismiss and her influence was based on the complainant's colour. While this possibility does exist, there was no evidence before me that Mrs. Thuilliard influenced the decision to dismiss the complainant. As already noted, the nature of her position seemed to be more in the nature of a lead-hand, notwithstanding the designation of forelady given to her. Thus, even if Mrs. Thuilliard herself was influenced by racial bias, this did not make it an operative element in the dismissal.

It is also possible that the epithet allegedly used by Mrs. Thuilliard created a discriminatory condition of employment which violated the Human Rights Code independently of the decision to dismiss. However, on the evidence, before me, at most this was only shown to be "an isolated offensive outburst" by another employee. Such an occurrence does not put the employer in violation of the Code even where the other employee is in a supervisory position: Simms v. Ford of Canada (Ontario Board of Inquiry, Kreever, 1970) at 18.

This leaves me with the task of determining whether there was discrimination from a careful and objective analysis and scrutiny of the conduct which occurred in its context, as stated in the Kennedy case.

In accord with obligation upon the Board of Inquiry to examine the circumstances objectively, it is often useful to compare the treatment of a person who complains of unlawful discrimination with the treatment of other employees in similar circumstances where an obvious variable is the factor which is alleged to be the basis of discrimination. This approach is not very helpful in this case, however, since both the complainant's conduct which the respondent claims to be the real basis for its action and the respondent's action seem virtually unprecedented.

The complainant admits that she did slap her supervisor, albeit lightly and at what she interpreted to be his invitation to do so. It is also clear that the complainant and Mr. Ledermann were having difficulty communicating at the time so that a misunderstanding between them over whether such an invitation was given was not surprising. It is a plausible explanation that, because of this misunderstanding, the complainant was dismissed for doing something she thought she was privileged to do. This might be unfair, but on such an interpretation there would be no violation of the Human Rights Code.

Since the striking of a supervisor by an employee was, so far as the evidence went, unprecented for the respondent, no comparison can be made as to whether other incidents were dealt with in the same way.

Similarly, the respondent appears to have had no prior experience with the dismissal of employees. One incident of subsequent dismissal of Mrs. Atkins was referred to in the evidence, but the circumstances seem so different that any comparison would be extremely tenuous. Since Mrs. Atkins is also a black person of Jamaican origin, it might be inferred that this reinforces the allegation of unlawful discrimination. However, the circumstances were not extensively explored in the evidence and I am not prepared to make such an

inference on the evidence before me. Without other incidents of dismissal, a comparison cannot be made as to whether the criteria used by the respondent in such cases support its contention that the complainant's dismissal was fully explicable without reference to unlawful considerations. The very lack of other dismissals might suggest that no such criteria existed and in itself produce an inferrence of unlawful discrimination. In light of the complainant's own unprecedented action, however, I conclude that the unprecedented nature of the respondent's dismissal of her is not sufficient to support a finding of discrimination.

The closest similar event that was related in the evidence was an incident of fighting between Mrs. Atkins and Laurie LaMarsh, a co-worker who quit shortly before the complainant was dismissed. Both Mrs. Atkins and Ms. LaMarsh were suspended for what appears initially to have been a three-day period, but they were brought back after one-day when they undertook not to repeat the incident. The treatment of the two participants on that occasion appears non-discriminatory.

This incident has enough in common with that involving the complainant that it provides some basis for comparison. However, this comparison does not lead very far because characteristics of the parties which are prohibited as grounds for discrimination were a constant factor, rather than a variable. Both incidents involved a black person of Jamaican origin in conflict with a white person of Canadian origin. The complainant was treated differently from everyone else involved in the two incidents. Since prohibited factors were constant between the two incidents, the logical inference from a comparison would be that some factor other than a prohibited one led to the difference in treatment.

The major variable that presents itself is that the complainant came into conflict with supervisory personnel, both in the initiating incident with Mrs. Thuilliard and in the subsequent meeting with Mr. Ledermann. The early incident involved only two ordinary employees. To some extent, therefore, this comparison tends to support the respondent's explanation that it was a physical assault on a supervisor which singled the complainant out for dismissal.

On the other hand, this comparison also underlines a sharp contrast in treatment between Mrs. Thuilliard and the complainant. At the time in question, the complainant had reported that Mrs. Thuilliard had slapped her. On the witness stand, Mrs. Thuilliard's side of the story was that the complainant had grabbed her on the chin, although I have some doubts as to the credibility of this both because the testimony of Wesley McKenzie, the Commission's investigator, contained no reference to any such allegation in his interview with Mrs. Thuilliard and because a grabbing of the chin is physically awkward and thus a rather unlikely form of aggressive contact. In any event, viewed most favourably from the respondent's perspective, Mr. Ledermann was presented with conflicting versions of a conflict between the complainant and Mrs. Thuilliard.

Mr. Ledermann testified that he investigated the matter by asking the other workers if they had seen what happened. None admitted to having seen anything. As a result, Mr. Ledermann was left with one employee's word against another. While the severity of the action taken to dismiss the complainant might be explained by her subsequent slapping of Mr. Ledermann himself, the total absence of any further action upon the complainant's allegation that she had been slapped by Mrs. Thuilliard called for some explanation. None was offered.

Since, as previously noted, Mrs. Thuilliard was more of a lead-hand than a true member of management, it is doubtful that her supervisory position justified treating the complainant's allegations against her as unimportant. The complainant testified that she suffered pain as a result of the slapping, and this was supported by the fact that she consulted a doctor. In the absence of a witness, therefore, Mr. Ledermann might at least have sought some medical or para-medical advice on whether the complainant's allegations could be corroborated. It appears he simply accepted Mrs. Thuilliard's word and rejected that of the complainant, which was hardly even-handed.

In the final analysis, the process of comparison resolves nothing. On the one hand, it supports the respondent's explanation because of the even-handedness of the earlier treatment of Mrs. Atkins and Ms. LaMarsh. On the other hand, it raises an unexplained differential in the treatment of Mrs. Thuilliard at the time of the complainant's dismissal.

This leaves the case to be resolved essentially on the basis of the credibility underlying the explanation of the complainant's dismissal which was offered by the respondent.

If this explanation is credible on the whole of the evidence, there would not appear sufficient evidence that other unlawful factors also affected the complainant's dismissal. If this explanation is not credible, however, an inference of discrimination may arise. The dismissal would be"consistent with the allegation of discrimination and inconsistent with any other rational explanation", in the words of the Kennedy decision, since the one potentially rational explanation would have been found not credible.

I would note that the appropriateness of the standard just quoted from the Kennedy case is questionable. It appears more consistent with the requirements of proof beyond a reasonable doubt, than with proof on the balance

of probabilities which is the onus on the Commission under the Code. However, it is not necessary for me to resolve this question since the matter does resolve itself into the credibility of the only alternative rational explanation that was offered. I do not think it can be disputed that any such explanation must be not only rational, but also credible on the whole of the evidence.

On the whole of the evidence, I do not find the explanation offered by the respondent to be credible. In the first place, it is evident that the reason for dismissal was never made known to the complainant. It can happen that an employer's mind is itself unclear as to the reasons for dismissal of an employee because the action is based on a cumulation of incidents of which no one is decisive. However, I find it hard to believe that, where a dismissal is based on a clear, discreet event, as this one was alleged to be, the decision-maker would not attempt to immediately justify the decision to the employee. The fact that the reason now alleged was not offered at the time strongly suggests that it was not perceived as the reason at the time.

Secondly, while Mr. Ledermann was left with the discretion to decide what action to take with respect to the complainant, it is apparent that his superiors, Mr. Sander and Mr. U. Meyer, were aware of events immediately afterward, and became even more involved a few weeks later when contacted by the Ontario Human Rights Commission. It seems that they were under the impression at the time that the complainant had been dismissed for fighting with another employee, namely, Ms. LaMarsh, who had quit about the same time. Moreover, they continued to be under this impression until sometime after the Commission's investigation was underway. Again, it seems hard to believe that, if Mr. Ledermann had based his decision on the complainant's act of slapping him, he would have left his superiors under this impression.

Mr. McKenzie testified that Mr. Ledermann, when interviewed by Mr. McKenzie, first named fighting as the reason for the complainant's dismissal. It was only toward the end of the interview that Mr. Ledermann raised the slapping incident. I have no reason to doubt the accuracy of Mr. McKenzie's report of the interview since he relied heavily on notes that were taken at the time. This sequence in the interview further confirms that Mr. Ledermann did not perceive the slapping incident as the reason for dismissal.

Finally, on the witness-stand, Mr. Ledermann went to some lengths, indeed lengths which were barely credible, to emphasize that the complainant did not do her job satisfactorily. This also suggests that the slapping incident was not the real reason for dismissal. While poor performance in itself would be a lawful reason for dismissal, Mr. U. Meyer testified that they did not fire people for being poor workers, but rather laid them off when work was short. Thus, if this were the real basis of the complainant's dismissal, there would be a strong case for inferring unlawful discrimination by comparison with similar cases.

I find, therefore, that the slapping of Mr. Ledermann was not the real reason for the complainant's dismissal. This leaves, then, the question of whether on careful analysis and scrutiny I draw the conclusion that her race, colour, nationality, ancestry or place of origin was the real reason or a part of the real reason.

I am not inclined to the view that such unlawful considerations formed the major basis of the decision. Rather I think that a combination of factors played a part. For one thing, I think, Mr. Ledermann was bothered by the difficulty he had in understanding the complainant. The complainant is highly emotional, and uses crying as a means of emotional release. This probably annoyed Mr. Ledermann. I am also inclined to believe he did not think highly of her work performance.

In addition, I am satisfied that Mr. Ledermann was unhappy with the somewhat lax way in which Mrs. Thuilliard's predecessor dealt with her co-workers and was pleased by the way in which Mrs. Thuilliard took command. Out of this, I think he was upset by the complainant's attitude towards Mrs. Thuilliard's promotion to forelady. I think he saw some risk that things might get out of hand and saw an opportunity to resolve a number of his frustrations and put a dampener on potential defiance by making an example out of the complainant through her dismissal. None of this in itself violated the Human Rights Code.

However, I am also persuaded that, in dealing with the complainant, Mr. Ledermann picked upon her as an example because he did not hold her in proper regard as a person, and that her race, colour and place of origin were factors in his view of her. I think this is the only conclusion consistent with the abrupt and summary way in which he dismissed her. The complainant was, therefore, dismissed in part because of her race, colour and place of origin in violation of section 4 (1) (b) of the Ontario Human Rights Code.

During the hearing a great deal was made of a conflict in evidence over the date on which the complainant slapped Mr. Ledermann. The complainant testified that it occurred on March 27, a full day before her dismissal. The respondent's witnesses were quite firm that it occurred on March 28, during the shift at the end of which the complainant was fired. I do not think that the resolution of this dispute is necessary for I find the explanation that the slapping of Mr. Ledermann was the reason for the complainant's dismissal is not credible, regardless of the date of this incident.

The only other relevance of this issue goes to the credibility of the individual witnesses who testified to this item. Notwithstanding the importance of this incident to the whole matter, I do not think that a mistake such as this on a date provides a sufficient basis for determining the credibility of a

witness. The human mind is just too prone to erroneous time associations, even after a relatively short period of time. If the respondent's witnesses, three of whom addressed the date, were mistaken, I would not on this basis alone conclude that they were otherwise unreliable.

With respect to the complainant's testimony, it is quite possible that, even fairly soon after the events, she associated them in a shorter time frame than they actually involved. It is possible, for example, that the incident with Mrs. Thuilliard happened on March 27, but that the complainant's grievance to Mr. Ledermann during which she slapped him actually occurred the following day. Again, I do not think this would mean I should find her evidence generally unreliable.

On the contrary, I am favourably impressed by the complainant's testimony. Because she does not read English, she was unable to read the complaint form and attest to the facts as stated therein for the record. This is a practice commonly followed in such hearings. The respondent's counsel objected to having the form read to her for this purpose because it would lead the witness rather extensively. Since there seemed no reason why the same evidence could not be introduced by means of simple question and answer, I allowed the objection. As a result, the complainant testified without the benefit of a reminder of what she had stated in her complaint. Her evidence did not differ in any significant way from what was recorded by the intake officer who received her complaint over two years earlier. This very much persuades me as to the reliability of her testimony as a whole.

On the matter of remedy, counsel for the respondent indicated he would like to reserve the right to make further submissions as to remedy, particularly with respect to the amount of unemployment benefits received by the complainant, in

the event the merits were found against the respondent. I suggested that it might be an appropriate case for me to give counsel an opportunity to settle the amount of the award in accordance with such rulings I might make on the nature of the remedy, with leave to apply to me for a final determination in the event they were unable to settle the amount. On consideration, however, the amount of the award appears so simple to calculate that it seems preferable for me to settle the amount of the award with leave to apply for reconsideration in the event that counsel are of the opinion that I have erred.

The complainant is entitled to loss of wages during the period from her dismissal until the time when her employment would otherwise have terminated, subject to mitigation. None of the respondent's witnesses offered any evidence of any development that would have terminated the complainant's employment subsequently, had she not been dismissed on March 28. This leaves the evidence of the complainant who testified as to two relevant events. One was that she visited Jamaica in August, 1979, to look after her mother who was ill. At this time unemployment benefits which she received after dismissal were cut off. The second event was that she obtained a similar job on October 15, 1979 which would appear to have completely mitigated her losses.

The complainant's visit to Jamaica would have constituted a quit if she had still been employed by the respondent at the time. In view of the high turnover and low skill requirements of the respondent's employees, I am satisfied that it is unlikely that the complainant would have been rehired on her return from Jamaica. Moreover, it is unlikely a case could have been made out that such a refusal to rehire was discriminatory. I am not as certain that the respondent would have gone to Jamaica if faced with the possible loss of her job, rather than a mere loss of unemployment benefits. However, on the balance of probabilities, I think it likely that she would have. Thus, I would award

loss of wages for the period from March 29, 1979 through July 31, 1979 inclusive. The exact dates of the complainant's trip to Jamaica were not established. The complainant testified that it occurred in August and I must therefore exclude that entire month in the absence of more specific evidence. The complainant testified that her wages were $3.75 an hour at the time of dismissal. However, in suggesting a calculation to me, counsel for the Commission used the figure of $3.50 an hour. Since the complainant's memory of such details was not too definite, I regard counsel's representation, presumably based on the Commission's investigation, as an admission that $3.50 is the appropriate rate, for a weekly pay of $140. The period in question consists of 18 weeks, less one day. Thus, the total loss of wages is $2492.

Collateral benefits and deductions such as unemployment benefits and tax deductions are not relevant to the rights as between the parties, so I make no deduction for such items. It is possible, for example, that this award may give rise to a claim for overpayment from the Unemployment Insurance Commission which would upset any calculations taking unemployment benefits into account. In light of the irrelevance of such benefits, I see no prejudice to the respondent in my not granting counsel's request that I reserve decision for further submissions on the amount of such benefits.

With respect to other questions of mitigation, I am satisfied that the complainant conducted an adequate search for alternative employement. No deduction for failure to mitigate is called for.

In addition to loss of wages, counsel for the Commission requested compensation for humiliation to the complainant and an order directing the respondent to provide to the Commission an assurance of future compliance with the Code.

No evidence was presented to me of any actual humiliation or other injury to feelings experienced by the complainant as a result of her dismissal. On the other hand, the lack of sensitivity with which she was treated at the time of dismissal must have caused her some anguish. I would award the amount of $100 as compensation for injured feelings. This is intended to be more than a nominal sum, but to reflect also the fact that no substantial injury was proved. At today's values, this is not much more than a nominal sum. However, in the light of the recent awards in Imberto v. Vic and Tony Coiffure (Ontario Board of Inquiry, McCamus, 1981), and Bish v. Chez Moi Tavern (Ontario Board of Inquiry, Haynes, 1981), both of which awarded $100 under this head, I do not think I should award a larger amount without substantial evidence of the complainant's actual suffering, as was present in the other recent such decision in Cousens v. Canadian Nurses Association (Ontario Board of Inquiry, Ratushny, 1981).

Finally, in light of the fact that the violation of the Code in this case arose out of a nearly complete discretion given to the foreman in personnel decisions after the initial hiring, and in light of evidence that the respondent's owners did not take the matter seriously until the Commission's investigation was well underway, I think this is an appropriate case to require that an assurance of future compliance be given. While the owners, Mr. Sander and Mr. U. Meyer, may be sufficiently impressed with the importance of the Code's requirements by this decision itself, the giving of an undertaking should help in ensuring that they will also impress this upon those to whom personnel responsibilities have been delegated. In furtherance of this, I would also direct that notice of this assurance be given to each employee with responsibility for personnel matters.

ORDER

For the reasons set out above, I order as follows:

1. It is ordered that the respondent pay the sum of $2492 for loss of wages by the complainant and $100 for injured feelings of the complainant.

2. It is ordered that the respondent forthwith send a letter of assurance to the Ontario Human Rights Commission, undertaking to comply with The Ontario Human Rights Code in the future, and give notice of this letter to each of its employees having responsibility for personnel matters.

Counsel may apply for reconsideration of the calculation of loss of wages, upon notice to the other parties.

DATED at Windsor this 26 day of May, 1981.

Robert W. Kerr
Board of Inquiry